

Draft Memorandum

This is a preliminary draft and working paper prepared on legal issues addressing mental impressions, conclusions, litigation strategies, and legal theories relating to likely civil or adversarial administrative proceedings. N.D.C.C. §§ 44-04-18(8) & 44-04-19.1(3).

MEMORANDUM

TO: Francis Schwindt, Wayne Stenehjem, Robert Harms
FROM: Lyle Witham, A.A.G.
DATE: (working paper)
RE: Legal issues relating to PSD baseline and increment consumption

Summary of Legal Points

- The "cardinal rule" of statutory construction is that the interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of the statutes. The rules of statutory construction are also applied to the interpretation of administrative rules. Ambiguities in the PSD statutes and rules must be resolved by examining the entire Act and interpreting it in the context of its underlying purpose and intent. (pp. 9-12)
- The CAA recognizes in its introductory language that air pollution prevention and air pollution control at its source is the primary responsibility of states and local governments. The Train principle affirms the central role of the states in air pollution control and management of sources. In the division of authority over the PSD program, Alabama Power draws the line between federal and state authority over the PSD increments at essentially the same place the line was drawn in Train and by Congress. EPA may promulgate rules and guidelines to help the states manage the allocation of available increments and has authority under the CAA to prevent or to correct a violation of the increments when the states fail to do so. But the EPA may not prescribe the manner in which states will manage their allowed internal growth. Congress has left PSD growth-management decisions for resolution by the states. The EPA lacks authority to dictate to states their policy for management of the consumption of allowable increments. (pp. 12-21)
- Congress' stated intent that PSD law "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources" involved not only (1) a concern about "clean air" and the environment, but also (2) a concern about "economic growth" (which is the context in which the Sierra Club v. Ruckelshaus case was filed and the PSD law was passed) and (3) a concern about

the threat of a large scale shifting of industry from NAAQS "nonattainment" areas to "clean air" areas like North Dakota. The federal PSD statutes under the '77 CAA amendments, and the PSD rules and regulations at 45 FR 52675 as revised in response to Alabama Power, have remained essentially unchanged since 1980 and are still the governing federal laws and guidance on the issues of establishing a "baseline concentration" under PSD and calculating "increment consumption". The 1980 regulations, therefore, are the focus of the legal discussion concerning how "baseline concentration" should be established and increment consumption calculated. (pp. 22-44)

- Substantive rules and interpretive rules and regulations EPA has duly promulgated in the federal register after following CAA § 307(d)(5) & (6) should be given "Chevron deference" because that is the level of deference that will be given to those promulgated regulations in any dispute between EPA, the state, and/or industry in any action where the interpretation of those promulgated regulations is an issue in federal court. Unpublished PSD interpretations and guidance that EPA has failed to promulgate in the federal register as required by CAA § 307(d)(5) & (6) should be given Christensen-Mead deference – that is, the Department must follow them only to the extent persuasive – because that is the level of deference that will be given to those unpromulgated regulations in any dispute between EPA, the state, and/or industry in any action where the interpretation of those unpromulgated regulations is at issue in federal court. (pp. 45-59)
- There are two basic issues the Department must address to establish a baseline concentration for each source in existence as of the minor source baseline date. First, the Department must identify the "sources," both major and minor, that were "in existence" as of the minor source baseline date that affected the "ambient concentration levels" of SO₂ in North Dakota's Class I areas at that time. Second, the Department must determine what data are "representative" of those sources. To determine what data are "representative" of those sources, the Department should give Chevron deference to EPA's '80 regulations which contain a two part process for determining the baseline concentration for relevant sources. The Department must first determine the "[a]ctual source emissions" as "estimated from source records and any other information reflecting actual source operation over the two-year time period preceding the baseline date." The Department must then determine whether this calculation is "representative" of "normal source operation." If a source can demonstrate that its operation after the baseline date is more representative of normal source operation than its operation preceding the baseline date, then "the definition of actual emissions" allows the Department "to use the more representative period to calculate the source's actual emissions contribution to the baseline concentration." (pp. 60-67)
- The terms "representative" and "normal source operation" arise out of the definition of "actual emissions" at N.D. Admin. Code § 33-15-15-01(1)(a)(1) as adopted and incorporated from the '80 regulations promulgated at 45 FR 52675 et seq. This

definition allows the Department to establish the baseline concentration for all relevant sources based on a source's "operation after the baseline date" if it is "more representative" of "normal source operation" in establishing the "baseline concentration" that will allow the Department to calculate consumption or expansion of the available increment. There is no reliable monitoring data for the Department to use from 1977 and 1978 to help establish a baseline concentration for SO₂ based on monitoring. Thus, the Department must follow the procedure outlined on pages 60-67 to establish "baseline concentration" for SO₂ for each relevant source. (pp. 67-87)

- The "actual emissions" representative of the "baseline concentration" or the "baseline level" must be expressed as an "actual rate of emissions of a contaminant from an emissions unit," and "must equal the average rate, in tons per year, at which the unit actually emitted the contaminant during a two-year period which precedes the particular date and which is representative of normal source operation." N.D. Admin. Code § 33-15-15-01(1)(a) & (a)(1). The "actual emissions" definition requires that the "rate" for both the "baseline concentration" and "baseline level" *must* not only "equal the average rate, in tons per year, at which the unit actually emitted the contaminant," but also "must be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period." N.D. Admin. Code § 33-15-15-01(1)(a)(1). The operative word in the rule is the word "rate." (pp. 87-110)
- The Department must determine the PSD "baseline concentration" for SO₂ for each of the periods of time for which a PSD increment applies. N.D. Admin. Code § 33-15-15-01(2)(b); CAA § 163(b); 42 U.S.C.A. § 7473(b). For SO₂, there are three such periods — ~~annual, twenty-four-hour, and three-hour.~~ Id. The annual "baseline concentration" is the "average rate, in tons per year, at which the unit actually emitted the contaminant" over the time period that is representative of normal source operation — either the two years preceding the minor source baseline date or another "different time period" *after* the minor source baseline date that is "more representative" of normal source operation. N.D. Admin. Code § 33-15-15-01(1)(a)(1). The twenty-four-hour "baseline concentration" is the "actual rate of emissions" of SO₂ emitted at the "average rate, in tons per year" over a twenty-four-hour period. The three-hour "baseline concentration" is calculated in the same way — the "actual rate of emissions" of SO₂ emitted at the "average rate, in tons per year" over a three-hour period. (pp. 87-110)
- Establishing the baseline and determining increment consumption will require the following steps: (1) establish an SO₂ "baseline concentration" for the annual, twenty-four hour, and three hour increments for all major and minor sources in existence as of the minor source baseline date (baseline sources) as described at pages 64-66 and 94-98 above using the actual rate of emissions methodology; (2) determine the SO₂ "baseline level" for the annual, twenty-four hour, and three hour increments for all operating baseline sources and increment consuming sources to

establish using the actual rate of emissions methodology; (3) calculate increment expansion or consumption for the annual, twenty-four hour, and three hour increments for each baseline source by comparing the "baseline concentration" to the "baseline level," (4) consider emissions that have occurred or will occur at sources that have submitted a complete PSD application within 30 days prior to the date the proposed source files its application as well as any emission changes; (5) model all increment consuming emissions for the annual, twenty-four hour, and three hour increments after considering all relevant baseline levels and adjusting increment expansion or consumption; and (6) adjust source-specific permits and the SIP to prevent double counting of emission reductions and to make the calculated actual emission levels federally enforceable. (pp. 87-110)

- ~~The '80 PSD regulations state that using allowable emissions will inappropriately predict PSD increment violations. EPA's unpromulgated policies and guidelines use permit allowable emissions. This is inconsistent with the actual emissions calculations required under the rules and regulations in N.D. Admin. Code ch. 33-15-15 and the actual emissions method of calculating increment consumption and expansion in EPA's '80 PSD regulations. The Department may apply Christensen-Mead deference to the alternatives, but must follow its promulgated rules where the guidelines and unpromulgated policies are inconsistent with in N.D. Admin. Code ch. 33-15-15. (pp. 110-118)~~
- Congress maintained the language from the '74 rules that the maximum increase for the twenty-four-hour and three-hour be measured over a single established twenty-four-hour and three-hour baseline concentration, and the December '77 regulations promulgated after Congress passed the '77 PSD amendments to the CAA continued to define the twenty-four-hour and three-hour baseline concentrations as "the second highest measured or estimated concentration at a given site." Alabama Power overturned the uniform baseline date established in the June '78 PSD regulations as well as the provisions of interpretive rule or preamble dealing with "baseline concentration." The first alternative of determining a single twenty-four-hour and three-hour baseline concentration is the correct approach under the law. The second alternative, modeling increment consuming emissions only, must be rejected for two reasons. First, it uses floating baseline concentrations for each three-hour and twenty-four-hour period modeled, rather than a single three-hour and twenty-four-hour concentration as required by both the federal statute and North Dakota's rule. Second, the law requires determination of existing ambient concentration levels at the baseline date. Modeling increment consuming emissions only along with changes in emissions from baseline sources ignores ambient concentration levels at the baseline date by creating a floating baseline that changes with each time period, and does not consider whether the worst case short term conditions are getting better or worse by comparing those conditions to the single short term baseline concentration required by law plus the maximum allowable increase from increment consuming sources. In contrast, use of a single baseline allows the Department to judge whether the worst case short term conditions in the

park are getting better or worse – which is the underlying intent and purpose of the law as understood and adopted by Congress in 1977. (pp. 118-24)

- SO₂ emissions from Little Knife and DGC consume increment against the alternative Class I increment under CAA § 165(d)(2)(C)(iv), 42 U.S.C.A. § 7475(d)(2)(C)(iv) and N.D. Admin. Code § 33-15-15-01(4)(j)(4)(b), but not the Class I increment under CAA § 163(b)(1), 42 U.S.C.A. § 7473(b)(1). The alternative Class I increments do not apply to existing facilities not granted variances. However, a new source seeking a variance under CAA § 165 only must show compliance with the alternative Class I increments that would apply if the variance is granted, not the increments under CAA § 163(b)(1). (pp. 125-38)
- ~~The same analysis for determining baseline concentration for major sources applies for minor sources. The Department must exercise best engineering judgment in reconstructing or estimating missing data and locations, using available monitoring data over the relevant time period to assist this effort, and making the other factual determinations necessary to establish oil and gas baseline concentrations for the many sources involved. (pp. 138-140)~~
- Sources for which complete PSD permit applications were filed prior to July 1, 1982 should not be counted as consuming Class I increment at the Elkhorn ranch site. (pp. 140-41)

Factual Summary

~~Martin Schock of the Health Department has developed a working draft of a~~
factual history of the PSD program in North Dakota which has served as the factual foundation of this draft legal analysis. It is adopted and incorporated by reference for this working draft. A copy of this factual history is attached.

1. Introduction

In early July, 2001 the North Dakota Department of Health (Department) sent out letters to companies that operate major sources regulated under the Prevention of Significant Deterioration (PSD) portion of the Clean Air Act (CAA) administered by the Department under state and federal law. The Department has had primacy over this program under its State Implementation Plan (SIP) since 1977. The letters to the major

sources asked them for information, comments, and legal positions relating to PSD baseline concentration, and requested specific information and responses relating to historical emissions. Copies of these letters are incorporated by reference. In response to this request, the Department received letters from Amerada Hess Corporation, Great River Energy, BP Amoco Mandan Refinery (recently purchased by Tesoro), Dakota Gasification Company, Minnkota Power Cooperative, Inc., and Basin Electric Cooperative. These letters and responses are incorporated by reference.

Based on these responses I have been asked to develop a legal analysis with regard to PSD baseline. The Department is considering holding a hearing to address baseline concentration and increment consumption. Additional written and oral testimony and comments may be presented at this hearing by companies operating major sources. Written and oral testimony and comments from any other interested person from the public may be presented at the hearing or in the comment period after the hearing.

2. Definitions of "Baseline Concentration" and Issues Raised

The Department must complete several types of analyses to determine the PSD "baseline concentration" for sulfur dioxide for each of the periods of time, annual, twenty-four-hour, and three-hour,¹ for which a statutory standard and limit applies:

- a legal analysis of federal and state statutes, rules, and other laws that apply, and of the rules of construction and interpretation that govern any ambiguities or conflicts that exist under those laws;
- an historical analysis of the interpretation and application of the federal and state statutes and rules by EPA and the Department; and

¹ These are the three periods of time for which a "maximum allowable increase in concentrations of sulfur dioxide... over the baseline concentration" were established by Congress for each of the three classes of areas established by federal statute. CAA § 163(b), 42 U.S.C.A. § 7473(b).

- a factual analysis conducted pursuant to the determinations made under the legal and historical analyses, and which uses the best available relevant information relating to the minor source baseline date, to determine the PSD "baseline concentration" for sulfur dioxide for each of the periods of time (annual, twenty-four-hour, and three-hour) for which a statutory standard and limit applies.

Because the legal and historical analyses will guide the factual analysis, this memorandum will address issues relating to legal and historical analyses. The rules of construction and interpretation that apply to statutes and rules often look to the application and interpretation of those statutes and rules by the administering agencies.

Thus, there is overlap between legal and historical analyses in these findings. But to the extent possible, legal and historical analyses will be kept separate. Before proceeding with these analyses, it is useful to begin with the definition of "baseline concentration" to focus on the relevant issues that must be addressed.

The term "baseline concentration" is defined in the governing federal PSD statute, and re-defined in the federal and state PSD rules. The CAA defines "baseline concentration" at CAA § 169(4), 42 U.S.C.A. § 7479(4), as follows:

The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

The federal rules implementing 42 U.S.C.A. § 7479(4) under the CAA re-define

“baseline concentration” as follows:

(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

- (a) The actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in paragraph (b)(13)(ii) of this section;
- (b) The allowable emissions of major stationary sources which commenced construction before the major source baseline date, but were not in operation by the applicable minor source baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

- (a) Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and
 - (b) Actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.
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40 CFR § 51.166(b)(13). *See also* 40 CFR § 52.21(b)(13), which is identical in wording to 40 CFR § 51.166(b)(13).

The definition of “baseline concentration” under the North Dakota PSD rules exemplifies how closely the state rules follow the federal rules in their language:

(1) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each contaminant for which a minor source baseline date is established and includes:

- (a) The actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in paragraph 2;
- (b) The allowable emissions of major stationary sources

which commenced construction before the major source baseline date but were not in operation by the applicable minor source baseline date.

(2) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increases:

- (a) Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and
- (b) Actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

N.D. Admin. Code § 33-15-15-01(1)(d). Compare to 40 CFR § 51.166(b)(13) and 40 CFR § 52.21(b)(13) above.

The definition of "baseline concentration" at N.D. Admin. Code § 33-15-15-01(1)(d) and the federal rules from which this definition is derived, differs, however, from the statutory definition of "baseline concentration" at 42 U.S.C.A. § 7479(4). The legal significance and effect of these differences, and their legislative and administrative history, will be discussed both under the legal analysis and historical analysis that follows.

The issues raised in the letters to the Department relating to what sulfur dioxide (SO₂) emissions from stationary sources in North Dakota are part of the SO₂ "baseline concentration", and what SO₂ emissions consume increment, appear to raise legal issues of first impression under both state and federal law. There were many issues raised, but for the most part these issues can be reduced to the following issues:

1. Of the five alternative being considered by the Department, which formula should the Department use in calculating three-hour and twenty four hour increment consumption?

2. For each permitted major stationary source, which source emissions are baseline emissions that do not consume increment, and which source emissions consume increment?
3. How should the department identify the relevant "air quality data" from which the "baseline concentration" is calculated as of the minor source baseline date?
4. What are the relevant "air quality data" from which the three-hour maximum and twenty-four-hour maximum "baseline concentration" should be calculated for each baseline source?
5. To what extent should the relevant "air quality data" for calculating "baseline concentration" include any reasonably anticipated increases or decreases genuinely reflecting "normal source operation" as of the minor source baseline date? This issue has several sub-issues:

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- a. If a pre-January 6, 1975 major source demonstrates that its operation after the minor source baseline date is more representative of "normal source operation" than its operation preceding the baseline date, how should the Department identify the relevant "more representative period" to calculate the source's actual emissions contribution to the baseline concentration?
 - b. How should the Department define "normal source operation" and what criteria should the Department use in identifying that time period or periods that are "representative" of "normal source operation"?
 - c. Should the time period that is representative of "normal source operation" for that particular source be a two-year period, a shorter period of time, or

- a longer period of time, for example, five years or all the time between the minor source baseline date and the present?
- d. Should the Department eliminate shorter periods of time within the selected time period that are not representative of normal source operation before calculating the "baseline concentration"?
 - e. To what extent does the rebuttable presumption under the increment consumption regulations that "in calculating actual emissions, emissions ~~allowed under federally enforceable source-specific requirements~~ should be presumed to represent actual emission levels" also apply to making baseline concentration calculations and determinations?
 - f. If the rebuttable presumption that "federally enforceable source-specific ~~requirements correctly reflect actual operating conditions~~" applies, when should the Department consider that presumption to be rebutted because ~~"reliable evidence is available which shows that actual emissions differ from the level established"~~ for that source in the SIP or in the source-specific permit?
 - g. How should the determinations made in subparts a-f above be applied to the calculation to determine the three-hour maximum and twenty-four-hour maximum baseline concentration for each baseline source?
6. What are the relevant "air quality data" that should be used in calculating the contribution to the "baseline concentration" from minor sources (oil and gas production sources in particular) as of the minor-source baseline date? This issue has two sub-issues:

a. If relevant "air quality data" of actual emissions from minor sources are not available, should the Department establish a "minor-source baseline concentration" using the same criteria established under issue 4 – for example, establish a "minor-source baseline concentration" based on identification of a time period or periods that are "representative" of "normal source operation"?

b. Should a "de minimus" concept apply to a minor source's impact on ambient concentrations and/or to a source's emissions under PSD New Source Review (NSR), and, if so, how does the Department determine increment expansion or increment consumption from all minor sources in either (1) the context of determining whether existing sources are violating the increment, or, (2) the context of NSR review of modifications to an existing source or NSR review of a new source.

7. How do the CAA § 165(d)(2)(C)(iii) Class I variances granted in North Dakota affect the consumption of increment?— This issue has the following sub-issues:

- a. How do the alternative statutory maximum allowable increases over baseline concentration allowed to sources granted a variance under § 165(d)(2)(C) affect increment consumption for other sources?
- b. Should the Department exclude emissions from a § 165(d)(2)(C) variance source (to which the alternative statutory maximum allowable increments established in § 165(d)(2)(C)(iv) apply) when calculating

whether a violation of the increments established in § 163(b)(1) is occurring?

- c. Do other sources, other than the § 165(d)(2)(C) variance source, get the benefit of the stepped-up increment for Class I areas established in § 165(d)(2)(C)(iv) when a variance is granted under § 163(2)(C)(iii)?

- 8. In light of the determinations made under issues 1-6, how should the Department calculate PSD increment consumption and increment expansion from each permitted major source and from minor sources?

To address these issues, these proposed findings will proceed in the order described above, beginning with a legal analysis, then moving forward with an historical analysis and a factual analysis.

3. Legal Analysis

The Department must first determine the "baseline concentration" for sulfur dioxide under 42 U.S.C.A. § 7473(b) and N.D. Admin. Code § 33-15-15-01(2)(b), before it can determine whether a maximum allowable increase in concentration of sulfur dioxide has occurred. There are three separate time periods for which a "baseline concentration" must be established: annual; twenty-four-hour; and three-hour. *Id.* Because the preliminary "worst case" modeling performed by the Department shows potential PSD increment violations only for SO₂, only for Class I areas, and only for the twenty-four-hour maximum and three-hour maximum increments, these findings will focus primarily on determining which SO₂ emissions from major stationary sources in North Dakota should be included in the SO₂ baseline concentration, and which SO₂ emissions from those sources consume PSD increment in the Class I areas. Since the

potential violations only involve the twenty-four-hour and three-hour baseline concentrations, these findings will focus primarily on these periods. Because PSD variances have previously been granted for the Class I areas located in North Dakota, these findings also will address the force and effect of those variances on PSD baseline concentration and PSD increment consumption. In addition, the Department has issued numerous permits to major stationary sources located in the state based on determinations by the Department at the time those permits were issued concerning whether SO₂ emissions from those sources and other sources were part of the "baseline concentration" or were increment consuming. The legal and practical effect of these previous determinations must also be considered in these findings.

Before reaching these issues, it is necessary to establish the legal rules of construction and interpretation that apply.

a. Rules of construction and interpretation

As discussed in section 3c1A below, except for Indian Reservations, North Dakota's PSD rules, primarily N.D. Admin. Code ch. 33-15-15, are the rules that apply to all federal and state lands in North Dakota, including Class I areas. Thus, the North Dakota rules of construction and interpretation apply. It is both useful and necessary to keep them in mind throughout the discussion of the relevant state and federal laws.

The rules of statutory construction are also applied to the interpretation of administrative rules. Gofor Oil, Inc. v. State, 427 N.W.2d 104, 108 (N.D. 1988). The "cardinal rule" of statutory construction is that the "interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of the statutes." Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 144, 152-

53 (N.D. 1996); N.D.C.C. § 1-02-01. The interpretation of administrative regulations, like the interpretation of statutes, must be consistent with legislative intent and in furtherance of the policy goals and objectives. Heartview Foundation v. Glaser, 361 N.W.2d 232, 235 (N.D. 1985).

Generally in interpreting a rule or statutory provision, the legislative intent must be sought first from the language of the provision itself. See Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585, 586-87 (N.D. 1986). In construing a rule or statutory provision, it is necessary to consider the entire enactment of which it is a part and, to the extent possible, interpret the provision consistent with the intent and purpose of the entire Act. Id.

An agency has reasonable range of informed discretion in the interpretation and application of its rules, and its expertise is entitled to deference when the subject matter is complex or technical. Americana Health Care Center v. Dep't of Human Services, 540 N.W.2d 151, 153 (N.D. 1995). When a state statute or rule is adopted from a federal statute or rule, it is adopted with knowledge of the interpretations placed upon them by the federal body. Unemployment Compensation Division v. Bjornsrud, 261 N.W.2d 396, 398 (N.D. 1977) (interpreting the state rules of civil procedure as adopted from the federal rules). Although the agency or court is not compelled to follow those interpretations, they are highly persuasive. Id. In the interest of uniform interpretation, the agency or court generally will be guided by those interpretations. Id.

A statute or rule is ambiguous when it is susceptible to differing, but rational, meanings. Doyle ex rel. Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 10, 621 N.W.2d 353. The interpretation of a statute or rule is a question of law. Id. Statutes or rules must be

harmonized to give meaning to related provisions and must be construed in their plain, ordinary, and commonly understood meaning. Id. The relevant statute or rule must be interpreted in context to give meaning and effect to every word, phrase, and sentence in a statute. Id.; see also N.D.C.C. § 1-02-03 (providing words and phrases of a statute must be construed according to the context). Courts generally defer to the interpretation of a statute by the agency administering the law unless that interpretation contradicts clear statutory language. Sprynczynatyk, 2001 ND 8 at ¶ 10, citing Saari v. North Dakota Workers Comp. Bureau, 1999 ND 144, ¶ 20, 598 N.W.2d 174.

When a statute or rule is ambiguous, it is appropriate to consider extrinsic evidence to interpret it. State v. Brossart, 1997 ND 119, ¶ 14, 565 N.W.2d 752.

N.D.C.C. § 1-02-39 provides:

If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble.

Finally, when two statutes or rules relating to the same subject matter appear to be in conflict, they should be harmonized and construed whenever possible to give effect to both if this can be done without doing violence to either. Stradinger v. Hatzenbuehler, 137 N.W.2d 212, 216-17 (N.D. 1965). The agency or court should search for a reasonable theory under which to reconcile them so that both are operative and may be given force and effect if it is reasonably possible to do so. Id.

In summary, North Dakota's PSD rules, primarily N.D. Admin. Code ch. 33-15-15, are the rules that apply to all federal and state lands in North Dakota, including Class I areas. The meaning of those rules, and their context within the relevant federal statutes, rules, and interpretations, must be understood according to the rules of construction summarized above.

b. Authority of the states under the CAA over managing PSD increment

~~To interpret N.D. Admin. Code ch. 33-15-15 consistent with its legislative intent and the intent of the underlying federal statutes, and in a manner that will accomplish their policy goals and objectives, it is useful to review the intent and purpose of the CAA and the context in which it developed. It is not practical to discuss the entire CAA in detail, but a summary of its development is critical in determining its legislative intent. These findings will summarize the development of the CAA, the PSD program, and North Dakota's air pollution control law, both in this subsection and the next subsection of these proposed findings.~~

Beginning in the last quarter of the 19th Century, air pollution developed into a large scale health and environment problem with the expansion of industry primarily in high population areas during the Industrial Revolution. This problem continued to grow in the 20th Century with the continued growth of cities and the changes induced by the automobile. Arnold W. Reitze, *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. Rev. 679, 680-86 (1999). States and local governments began to regulate air pollution by using their general police powers to protect public health, safety, and welfare, by regulating nuisances, and by implementing land use controls. *Id.* at 686-89.

When the federal air pollution control program began in the 1960's, major cities had air

pollution control agencies larger than most state agencies. Id. at 690-93. After passage of the Air Quality Act of 1967, the role of the federal government became more dominant. Id. The approach of the 1967 Act, which was continued with the passage of the Clean Air Act of 1970, was to require the states to develop, implement, and enforce the stationary source air pollution control measures. Id. at 694. The role of local governments diminished because states, not local governments, were given responsibility for implementing and enforcing the laws under the federal statutes and regulations, and state air quality standards preempted local laws where conflicts developed. Id. However, strictly local air pollution problems such as odors, open burning, and location of industrial sources continued (and still continue) to be regulated by local ordinances and zoning regulations as well as state laws and regulations. Id. The CAA recognizes these facts in the findings at CAA § 101, in which Congress summarizes the purpose and intent of the Act:

(a) Findings

The Congress finds—

- (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
- (2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;
- (3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of

States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

42 U.S.C.A. § 7401. (Emphasis supplied.)

The issue of whether the states or the Environmental Protection Agency (EPA) had primary responsibility for implementing air pollution prevention measures and regulating air pollution control at its source was one of the first issues the United States Supreme Court addressed under the 1970 CAA amendments. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 95 S. Ct. 1470 (1975). Train discusses the division of responsibilities between the EPA and states with respect to state implementation plans (SIPs) under CAA § 110, 42 U.S.C.A. § 7410. Train holds that CAA § 110 plainly charges the EPA with the responsibility for setting the national ambient air quality standards, but, just as plainly, EPA is relegated to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations that are necessary if the national standards EPA has set are to be met. Id. at 421 U.S. at 86-87. The CAA gives the EPA no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the primary and secondary standards set under CAA § 109 and § 110, and the EPA may devise and promulgate a specific plan of its own only if a state fails to submit a SIP under § 110 that satisfies those standards. Id. at 87-90. As long as the ultimate effect of a state's choice of emission limitations complies with the national standards for ambient air set by EPA, the state is at liberty to adopt whatever mix of emission limitations it deems best

suited to its particular situation. Id. at 87-89. The same review criteria apply to SIP revisions. Id. at 90.

Commonwealth of Virginia v. EPA, 108 F.3d 1397 (D.C.Circuit 1997), recently reaffirmed the principle declared in Train, *supra*, that CAA § 110 does not confer upon EPA the authority to condition approval of a state implementation plan on the state's adoption of specific control measures; it held the Train principle still pertains under the amendments to the Clean Air Act in 1977 and 1990, except that the EPA has authority to condition approval of a state implementation plan on a state's adoption of control measures recommended by an ozone transport commission pursuant to specific language of § 184, 42 U.S.C.A. § 7511, which is a provision added by the 1990 amendments to deal with interstate ozone air pollution.

Alabama Power Company v. Costle, 636 F.2d 323, 361-64 (D.C. Cir., dec. 1979, amend. 1980) raises in the PSD context of the CAA essentially the same issue addressed in Train, *supra*, 421 U.S. at 84-90, in the context of the National Ambient Air Quality Standards (NAAQs) – that is, the division of authority between the EPA and the states regarding setting, managing, and enforcing the PSD increments. Alabama Power draws the line between federal and state authority over the PSD increments at essentially the same place the line was drawn in Train and by Congress at CAA § 101(a)(3) [42 U.S.C.A. § 7401(a)(3) quoted above]: “We rule that EPA has authority under the statute to prevent or to correct a violation of the increments, but the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments.” Alabama Power, 636 F.2d at 361.